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In the Supreme Court of the United States

OCTOBER TERM, 1984

LEMAN L. HUTCHINSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was denied due process of law when, under the courts-martial system created by Congress pursuant to Article I, Section 8 of the Constitution, he was convicted upon the concurrence of at least two-thirds of a six-member court-martial.

(I)



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OPINIONS BELOW

The order of the United States Court of Military Appeals (Pet. App. 1a-2a) is reported at 18 M.J. 281. The original opinion of the United States Navy-Marine Corps Court of Military Review (Pet. App. 5a-61a) is reported at 15 M.J. 1056. The opinion of the United States Navy-Marine Corps Court of Military Review on remand (App., *infra*, 1a-2a) is unreported.

JURISDICTION

The judgment of the United States Court of Military Appeals (Pet. App. 1a-2a) was entered on June 1, 1984. A petition for reconsideration was denied on June 19, 1984 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on August 15, 1984. The jurisdiction of this Court is invoked under Section 10(a)(1) of the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1405 (to be codified at 28 U.S.C. 1259(1)).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial convened by the Commanding General, Second Marine Division, Fleet Marine Force, Camp Lejeune, North Carolina, of premeditated murder, felony murder, robbery, solicitation to commit murder, solicitation to commit robbery, two conspiracies to commit murder, and three conspiracies to commit robbery, in violation of Articles 118(1), 118(4), 122, 134, and 81 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918(l), 918(4), 922, 934, and 881. The court-martial members sentenced petitioner to be reduced in rank to pay grade E-1, to forfeit all pay and allowances, and to be put to death. The officer who convened petitioner's general court-martial, the Commanding General of the Second Marine Division, reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. 860, and approved the findings and sentence. The United States Navy-Marine Corps Court of Military Review reversed one of the three convictions for conspiracy to commit robbery, affirmed the remaining findings of guilty, and, upon reassessment, affirmed the sentence. Upon mandatory review pursuant to Article 67(b)(1), UCMJ, 10 U.S.C. 867(b)(1), the United States Court of Military Appeals held that the issues raised by petitioner were without merit, except for error in the imposition of the death penalty which required that the sentence be vacated and the case remanded to the court below. Thereafter, the United States Navy-Marine Corps Court of Military Review substituted a sentence of life imprisonment and accessory penalties for the sentence of death.

1. During January and February of 1981, petitioner went on a rampage of criminal activity.¹ In January,

¹As the United States Navy-Marine Corps Court of Military Review noted, petitioner "manipulat[ed], schem[ed] and plann[ed] over the space of a month to rob and kill his fellow Marines not only for the money, but also, it would seem, for the mere pleasure of it" (Pet. App. 52a-53a).

petitioner decided he wanted to kill a fellow Marine, Private First Class McCrae, "basically because he did not like McCrae, he thought it would be an easy way to steal money from McCrae, and he wanted to use McCrae's rifle card to obtain a Marine Corps issue rifle for his own use" (Pet. App. 7a). With his accomplice, Lance Corporal Haught, petitioner conceived a plan to lure McCrae, with the enticement of a fake drug deal, to an ammunition dump in the woods. There, petitioner would shoot McCrae and McCrae's body would then be buried. Because McCrae was not interested in the drug deal, this plan was never carried out. *Id.* at 7a.

On January 30, 1981, petitioner and Haught were joined by a third Marine, Private Spencer. These three conspired to rob persons at Camp Lejeune, North Carolina. Two individuals were subsequently accosted; \$20 was taken from the first victim, and \$7 and a watch were taken from the second victim. Pet. App. 7a-8a.

Three days later, on February 2, 1981, petitioner and Haught devised a plan to rob another Marine, Private First Class Morton. Haught escorted Morton to a wooded area where petitioner was to rob him. Petitioner jumped Morton, but Morton was able to fight off the attack. Pet. App. 8a.

The remaining charges resulted from the plan and actual perpetration of the robbery and murder on February 6, 1981, of still another Marine, Private First Class Gunter. On that date, petitioner devised an elaborate fake drug deal involving numerous Marines and solicited Haught to help him rob and murder Gunter. Haught drove Gunter to a secluded area of the base where the waiting petitioner ambushed Gunter, twice shooting him with a shotgun. A final shotgun blast was fired into Gunter's face by Haught. Pet. App. 8a-11a.

2. At trial, after extensive voir dire and examination of the court-martial members, a panel of six members was selected (Pet. App. 13a-14a, 21a).² As announced at trial, these members, by secret written ballot,³ with at least two-thirds of the members concurring in each finding,⁴ found petitioner guilty of all charges and specifications. The sentence imposed by the members included, *inter alia*, the death penalty — a sentence that requires and in fact resulted from the concurrence of all members.⁵

3. On appeal to the United States Navy-Marine Corps Court of Military Review, petitioner argued that his constitutional rights to due process of law and equal protection were violated when he was convicted by an allegedly non-unanimous vote of a court-martial panel composed of only six members. The United States Navy-Marine Corps Court of Military Review, in reliance on *United States v. Rojas*, 15 M.J. 902 (N.M.C.M.R. 1983), and cases cited therein, rejected petitioner's arguments (Pet. App. 30a-31a). The same claim was made to the United States Court of Military

²Article 16(1)(A) of the UCMJ, 10 U.S.C. 816(1)(A), provides that a general court-martial shall consist of a minimum of five members. Because petitioner's court-martial consisted of six members, however, this case does not properly present any challenge to Article 16; all that is involved is petitioner's attack on Article 52's provision for guilty verdicts to be rendered upon the concurrence of two-thirds of the court-martial members.

³Article 51(a) of the UCMJ, 10 U.S.C. 851(a), requires that voting by members be by secret written ballot.

⁴Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), requires that a finding of guilty be by the concurrence of two-thirds of the members present at the time the vote is taken. Even when more than the required two-thirds of the members vote to convict, that fact is not announced. See note 6, *infra*.

⁵Article 52(b)(1) of the UCMJ, 10 U.S.C. 852(b)(1), requires that a sentence to death be by the concurrence of all the members present at the time the vote is taken.

Appeals, which likewise found petitioner's arguments to be without merit (*id.* at 1a-2a).

ARGUMENT

1. Relying on *Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that five-person juries in nonpetty criminal cases violate the Sixth Amendment as made applicable to the states by the Fourteenth Amendment), and *Burch v. Louisiana*, 441 U.S. 130 (1979) (holding that nonunanimous verdicts by six-person juries in nonpetty criminal cases violate the Sixth and Fourteenth Amendments), petitioner contends that his conviction by a possibly nonunanimous six-member court-martial must be set aside. Regardless of the applicability of *Ballew* and *Burch* to courts-martial (a proposition we examine below), this case does not present the factual predicate necessary to support petitioner's argument. The record indicates that all of the heinous facts surrounding the commission of the crimes with which petitioner was charged were presented to the court-martial members before deliberation on findings. The actual vote for conviction is not a matter of record; only the required two-thirds vote was announced.⁶ After the conviction, the prosecution presented minor matters in aggravation of the offenses, and petitioner presented a substantial amount of evidence in mitigation. The vote for a sentence of death was unanimous. Given these facts, logic and common sense

⁶The Military Judges' Benchbook, Dep't of the Army Pamphlet 27-9 (1982), prescribes the format for announcing findings of guilt. The Benchbook provides (App. B at B-1):

(*State name and rank of Accused*) it is my duty as President of this Court to inform you that the Court in closed session and upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, finds you * * *.

Even when the actual vote for a finding of guilt is unanimous, the finding is announced in this format.

compel the conclusion that the vote for conviction also was unanimous. It is virtually inconceivable that a court member who had voted to acquit would thereafter vote for imposition of a sentence of death. It may fairly be assumed, therefore, that the fact-finding process of petitioner's court-martial met the constitutional standards established by *Burch* and *Ballew*, making this an inappropriate case in which to consider petitioner's challenge to the courts-martial system.

2. Even if the facts necessary to support petitioner's argument were present in this case, his attack on the two-thirds verdict established by Congress would fail. Under the guise of a Fifth Amendment due process claim, petitioner seeks to impose on the courts-martial system requirements this Court has found inherent in the Sixth Amendment's guarantee of a trial by jury. But petitioner concedes (Pet. 24 n.25), as he must, that he has no Sixth Amendment right to a jury trial. This Court has held in an unbroken line of cases stretching back to *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that the jury trial guarantee of the Sixth Amendment is not available to the military accused.⁷ In *Milligan*, the Court held that armed forces personnel, expressly exempted from the Fifth Amendment right of indictment, are also exempted, by necessary implication, from the Sixth Amendment right to trial by jury. 71 U.S. at 123. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court noted that neither the Sixth Amendment nor Article III, Section 2 of the Constitution requires trial by jury in the armed forces. The Court concluded that neither provision was intended to enlarge the right to jury trial as it existed at the time of

⁷*O'Callahan v. Parker*, 395 U.S. 258 (1969); *Reid v. Covert*, 354 U.S. 1 (1957); *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 8 (1942); *Kahn v. Anderson*, 255 U.S. 1 (1921).

enactment of the Constitution and the Bill of Rights. Rather, the Framers intended (317 U.S. at 39, emphasis added):

to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but *not* to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The legislative history available to interpret the jury trial guarantee admits of only one construction: it was never intended to apply to the military.⁸ The military courts have relied on this construction and have repeatedly rejected the precise contention raised by petitioner here.⁹

3. Petitioner's argument fares no better when viewed as a Fifth Amendment due process claim. Neither *Burch* nor *Ballew* dealt with Congress's power to create rules for courts-martial pursuant to Article I, Section 8 of the Constitution, a power that is *independent* of Article III, Section 2, and the Fifth and Sixth Amendments.¹⁰ Moreover,

⁸See generally Van Loan, *The Jury, the Court-Martial, and The Constitution*, 57 Cornell L. Rev. 363 (1972); see also Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

⁹United States v. Rojas, No. 81-2109 (N.M.C.M.R. Aug. 23, 1984); United States v. Seivers, 9 M.J. 612 (A.C.M.R.), pet. granted on other grounds, 9 M.J. 253 (C.M.A.), aff'd, 9 M.J. 397 (C.M.A. 1980); United States v. Yoakum, 8 M.J. 763 (A.C.M.R.), pet. granted on other grounds, 9 M.J. 137 (C.M.A.), aff'd, 9 M.J. 417 (C.M.A. 1980); United States v. Guilford, 8 M.J. 598 (A.C.M.R. 1979), pet. denied, 8 M.J. 242 (C.M.A. 1980); United States v. Montgomery, 5 M.J. 832 (A.C.M.R.), pet. denied, 6 M.J. 89 (C.M.A. 1978). The Court of Military Appeals has ruled contrary to petitioner's argument on similar issues. See United States v. Morphis, 7 C.M.A. 748, 23 C.M.R. 212 (1957); United States v. Walker, 7 C.M.A. 669, 23 C.M.R. 133 (1957).

¹⁰Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246 (1960); *id.* at 272-273 (opinion of Whittaker, J.); Reid v. Covert, 354 U.S. 1, 19-39 (1956) (plurality opinion); *id.* at 42 (Frankfurter, J., concurring); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

neither case dealt with the fundamental matter of the separate nature of military society.

a. This Court has long recognized the special deference due to judgments made by Congress in the exercise of its power to "make Rules for the Government and Regulation of the land and naval Forces" (U.S. Const. Art. I, § 8, Cl. 14). As the Court stated in *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (footnote omitted):

[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress.^[11]

Especially heightened deference is due Congress's judgments in this area when the practice at issue dates back to the earliest days of our Nation. From the adoption of the American Articles of War of 1776 until the enactment of the Uniform Code of Military Justice in 1950, the imposition of the death sentence required the concurrence of two-thirds of a court-martial panel, and conviction required only a simple majority. Section XIV, Art. 5, American Articles of War of 1776, *reprinted in* 5 Journals of the Continental Congress 801 (Ford ed. 1906) [hereinafter cited as *Journals*]. Since the adoption of the UCMJ, the imposition of the death penalty has required a unanimous vote, while conviction has required only the concurrence of two-thirds of the panel. Art. 52(a)(2), UCMJ, 10 U.S.C. 852(a)(2).^[12]

^[11]Accord *Chappell v. Wallace*, No. 82-167 (June 13, 1983), slip op. 4-6; *Middendorf v. Henry*, 425 U.S. 25, 43-48 (1976); *Parker v. Levy*, 417 U.S. 733 (1974); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Reaves v. Ainsworth*, 219 U.S. 296 (1911); *In re Vidal*, 179 U.S. 126 (1900); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

^[12]The vote for conviction must be unanimous only in those cases in which death is the mandatory sentence. Art. 52(a)(1), UCMJ, 10 U.S.C. 852(a)(1).

History demonstrates that these provisions are no accident but instead represent Congress's considered judgment on the balance to be struck between the rights of the individual and the special requirements of the armed forces. For example, Section XIV, Article I of the American Articles of War of 1776 provided that at least 13 officers were required for all general courts-martial. 5 *Journals* 800. After the cessation of hostilities with Britain, the Army was faced with large numbers of desertions and an understaffing of officers. The problem became particularly acute at frontier outposts. In 1786, the commander of one of these small outposts convened a court-martial composed of only five officers to consider charges of desertion placed against two soldiers. Both men were convicted, and both were sentenced to death. The court-martial as constituted was illegal, but Congress was sympathetic with the commander's plight. In 1786, the Articles were changed to permit a quorum of five officers at a general court-martial and three officers at a regimental court-martial. 30 *Journals* 145; see Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363, 384-385 n.118 (1972).

It was thus Congress's experience with military exigencies and the necessity for maintaining small, remote units, conditions that exist even today, that heavily influenced the structure of the court-martial panel. In enacting the UCMJ, Congress had a rational basis, rooted in two centuries of precedent and experience, for rejecting a unanimous verdict requirement.¹³ The essential business of the military is, after

¹³Congress considered testimony in favor of a unanimous verdict requirement before the UCMJ was enacted. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 757 (1949) (testimony of Col. Oliver). Article 52 was nevertheless adopted in substantially its present form. Moreover, since the UCMJ was enacted, Congress has

all, "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). Courts-martial, while of critical importance to the maintenance of discipline, are a decidedly secondary function. *Ibid.* "To the extent that those responsible for performance of this primary [fighting] function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Ibid.* In these circumstances, Congress could rationally conclude that diversion of the additional resources necessary to conduct any retrials

considered but not enacted at least three bills that would have specifically required unanimous verdicts. H.R. 7263, 7292, 7467, 92d Cong., 1st Sess. (1971).

In the 22 instances since 1950 when bills have been enacted by Congress changing various sections of the UCMJ, Congress has never seen fit to change the provision at issue in this case. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 *et seq.*; Act of Oct. 12, 1982, Pub. L. No. 97-295, § 1(12) and (13), 96 Stat. 1289; Military Justice Amendments of 1981, Pub. L. No. 97-81, §§ 1-6, 95 Stat. 1085-1089; Military Pay and Allowances Benefits Act of 1980, Pub. L. No. 96-579, § 12(a), 94 Stat. 3369; Defense Officer Personnel Management Act, Pub. L. No. 96-513, Tit. V, § 511(24) and (25), 94 Stat. 2922; Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, Tit. VIII, § 801(a) and (b), 93 Stat. 810-811; Act of Oct. 18, 1976, Pub. L. No. 94-550, § 3, 90 Stat. 2535; Military Justice Act of 1968, Pub. L. No. 90-632, § 2, 82 Stat. 1335 *et seq.*; Act of June 15, 1968, Pub. L. No. 90-340, 82 Stat. 178 *et seq.*; Act of Dec. 8, 1967, Pub. L. No. 90-179, § 1, 81 Stat. 545; Act of Nov. 2, 1966, Pub. L. No. 89-718, § 8(a), 80 Stat. 1117; Department of Transportation Act, Pub. L. No. 89-670, § 10(g), 80 Stat. 948; Government Employees Salary Reform Act of 1964, Pub. L. No. 88-426, Tit. IV, § 403(j), 78 Stat. 434; Act of Sept. 7, 1962, Pub. L. No. 87-651, § 104, 76 Stat. 508; Act of Sept. 7, 1962, Pub. L. No. 87-648, 76 Stat. 447 *et seq.*; Act of Oct. 4, 1961, Pub. L. No. 87-385, 75 Stat. 814 *et seq.*; Act of July 12, 1960, Pub. L. No. 86-633, 74 Stat. 468 *et seq.*; Hawaii Omnibus Act, Pub. L. No. 86-624, § 4(b), 74 Stat. 411; Act of July 5, 1960, Pub. L. No. 86-589, 74 Stat. 329 *et seq.*; Alaska Omnibus Act, Pub. L. No. 86-70, § 6(b), 73 Stat. 142; Act of Sept. 2, 1958, Pub. L. No. 85-861, § 33(a) and (b), 72 Stat. 1564; Act of Aug. 10, 1956, Pub. L. No. 84-1028, 70A Stat. 1 *et seq.*

that might be occasioned by a unanimous verdict requirement is too high a price to pay in terms of lost military preparedness.¹⁴ Petitioner has not demonstrated the "extraordinarily weighty" considerations necessary to overcome this long-standing congressional judgment. *Middendorf v. Henry*, 425 U.S. 25, 44 (1976).¹⁵

¹⁴The importance to the military justice system of avoiding retrials is highlighted by the fact that the system does not provide for "hung juries." See Rule 921(c)(3), *Manual for Courts-Martial, United States* (1984). If there are not the necessary votes for conviction, the accused is acquitted, even though half or more of the members of the court-martial may be persuaded beyond a reasonable doubt of his guilt. If Congress were compelled to require unanimous verdicts for conviction, it might find itself forced as well to import the civilian concept of retrials after hung juries, to the potential detriment of military efficiency.

¹⁵As this Court has consistently noted, many of the fundamental constitutional rights enjoyed in the civilian community cannot be accommodated in our system of military justice absent congressional direction to that end. See *Middendorf v. Henry*, 425 U.S. at 33-34, 42-43, 46-48; *Schlesinger v. Councilman*, 420 U.S. 738, 746, 757-760 (1975); *Parker v. Levy*, 417 U.S. 733, 743-752 (1974); *Gosa v. Mayden*, 413 U.S. 665, 672-678 (1973); *Relford v. Commandant*, 401 U.S. 355, 362-363, 367-369 (1971); *O'Callahan v. Parker*, 395 U.S. 258, 261-264 (1969). At the same time, however, it is important to note that while Congress has not chosen to grant the military accused the right to trial by jury, it has established independent safeguards against unjustified convictions. No charge may be referred to a general court-martial for trial without an impartial investigation into the evidence supporting the charge. Art. 32, UCMJ, 10 U.S.C. 832. This procedure includes the right of the accused to be represented by counsel. A convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. 834(a). After trial, the convening authority of *any* court-martial may not approve the findings of guilt unless he finds them to be correct in law and fact. Art. 64, UCMJ, 10 U.S.C. 864. Finally, the Court of Military Review may not affirm findings of guilt unless it is independently convinced of the accused's guilt beyond a reasonable doubt, Art. 66(c), UCMJ, 10 U.S.C. 866(c), and the accused may seek review of that decision by the Court of Military Appeals, a panel of three civilian judges. Art. 67, UCMJ, 10 U.S.C. 867. See generally *United States v. Boland*, 1 M.J. 241 (C.M.A. 1975); Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970).

b. The Court based its decision in *Ballew* on empirical studies of the group dynamics of civilian juries (435 U.S. at 231-243), and much the same reasoning formed the basis for the decision in *Burch* (441 U.S. at 138). No comparable studies exist for courts-martial panels. Nevertheless, it seems quite likely that the make-up of a court-martial is sufficiently different from that of a civilian jury that the available studies cannot form the basis for any reliable conclusions about the deliberative processes of courts-martial.¹⁶ For example, unlike civilian juries selected at random to represent a cross-section of the community, court-martial members are deliberately chosen on the basis of who is best qualified to sit as a court member. Art. 25, UCMJ, 10 U.S.C. 825. The result is a body far more homogeneous than the typical civilian jury and hence one that is likely to be influenced by quite different factors than those found significant in the studies of civilian juries.

The important question, however, is not whether the studies relied upon in *Ballew* shed light on the issue presented by petitioner, but whether this Court should take on the task of considering the dynamics of group decisionmaking by courts-martial. More than sociology is involved here; the asserted rights of the military accused must be balanced against the special and unique institutional needs of the armed forces. In light of the special deference due to Congress's judgments in this area, as well as Congress's generally superior fact-finding capabilities, we submit that that

¹⁶Petitioner relies (Pet. 25 & n.26) on the opinion of Professor Saks (Pet. App. 62a-71a) to the effect that conclusions drawn from studies of civilian juries should be transferable to courts-martial panels. But Professor Saks admits (*id.* at 63a-64a) that he knows of no comparable studies involving military populations, and he further acknowledges (*id.* at 68a-70a) that military populations could produce different results.

body, rather than civilian courts, should have the responsibility to consider the question whether studies of the type relied upon in *Ballew* ought to form the basis for any change in the UCMJ.¹⁷ As we have noted (see note 13, *supra*), Congress has considered but not enacted bills calling for unanimous guilty verdicts by courts-martial. The appropriate forum for resolution of petitioner's sociological arguments is therefore the Legislative Branch.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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OCTOBER 1984

¹⁷An excellent analysis of the separate nature of military society, past and present, and the reasons why Congress is the branch of government most adept at dealing with military justice, is contained in Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177 (1984).



APPENDIX
UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

No. 82-0203

UNITED STATES OF AMERICA, APPELLEE

v.

LANCE CORPORAL LEMAN L. HUTCHINSON, JR.,
U.S. MARINE CORPS, APPELLANT

Decided 9 August 1984

Before Gregory, Mitchell, and Barr, Military Judges.

PER CURIAM:

This case is before this Court on remand from the United States Court of Military Appeals.

Appellant was convicted by a general court-martial of conspiracy to commit murder (two specifications), conspiracy to commit robbery (three specifications), premeditated murder, felony murder, robbery, solicitation to commit robbery, and solicitation to commit murder, in violation of Articles 81, 118, 122, and 134, Uniform Code of Military Justice, respectively. He was sentenced to death, forfeiture of all pay and allowances, and reduction to pay grade E-1. The findings of guilty and the sentence were approved by the convening authority. On 22 April 1983, this Court set aside the finding of guilty as to one specification of conspiracy to commit robbery; however, the remaining findings of guilty and the sentence were affirmed. *United States v. Hutchinson*, 15 M.J. 1056 (NMCMR 1983).

By its Order of 1 June 1984, the Court of Military Appeals reversed our decision as to sentence, relying on its prior decision in *United States v. Matthews*, 16 M.J. 354 (CMA 1983), and the defects noted in that decision with the

military justice system as it relates to imposition of the death penalty.¹

Additional pleadings have now been filed before this Court on behalf of appellant and the Government. Upon consideration of these additional pleadings and the entire record, this Court reiterates its revulsion to appellant's crimes and affirms so much of appellant's sentence as provides for a dishonorable discharge,² forfeiture of all pay and allowances, and reduction to pay grade E-1, and substitutes confinement at hard labor for life for appellant's sentence to death.

/s/

J.J. GREGORY

/s/

C.H. MITCHELL

/s/

PHILIP C. BARR

¹On 24 January 1984, the President promulgated amendments to the *Manual for Courts-Martial, 1969 (Rev.)*, prescribing sentencing procedures to be followed in capital cases. Executive Order No. 12460, 49 Fed. Reg. 3169 (1984). These amendments only apply, however, to trials of capital offenses committed on and after 24 January 1984.

²A dishonorable discharge is by implication included in a death sentence. Paragraph 126a, *Manual for Courts-Martial, 1969 (Rev.)*.

